Supreme Court, U.S.
FILED

06-86 MAY 25 2006

OFFICE OF THE CLERK

No. _____

SUPREME COURT OF THE UNITED STATES

David Lee Smith,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

DAVID LEE SMITH

5800 East 6th Avenue Parkway
Denver, Colorado 80220
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PRO SE PETITIONER

QUESTIONS PRESENTED FOR REVIEW

First Question:

Whether it was proper for the judges of the Tenth Circuit to refuse to comply with 28 U.S.C. § 455(a) requiring a judge of the United States to disqualify himself in any proceeding in which his impartiality might reasonably be questioned, including the question of whether the Tenth Circuit's decision is in conflict with relevant decisions of this Court, as well as decisions of other United States Courts of Appeals on the same important matter.

Second Question:

Whether it was proper for the judges of the Tenth Circuit to refuse to rule on the issue of whether the Tax Court had deprived the petitioner of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, including the question of whether this refusal to rule is in conflict with decisions of other United States Courts of Appeals on the same important matter.

Third Question:

Whether the definition of the term "frivolous" used by the Tenth Circuit was so vague and indefinite as to violate due process of law, including the question of whether the tactic of imposing harsh and unjustified sanctions against the petitioner without due process of law was employed for the improper purpose or motive of depriving the petitioner of his right to appeal and receive meaningful appellate review, including his right to proceed pro se or by counsel under 28 U.S.C. § 1654, and the question of whether the Tenth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court.

Fourth Question:

Whether the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the Tax Court, as to call for an exercise of this Court's supervisory power, including the question of whether the Tenth Circuit has deprived the petitioner of property without due process of law.

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CITATIONS OF REPORTS

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David Lee Smith v. Commissioner of Internal Revenue, Nos. 04-9009 & 04-9010 (10th Cir., unpublished Order filed March 2, 2006).

JURISDICTION

The judgment or order sought to be reviewed was entered on December 6, 2005.

The petitioner's petition for rehearing and for rehearing *en banc* was denied by order dated March 2, 2006.

28 U.S.C. § 1254 is the statutory provision believed to confer on this Court jurisdiction to review the judgment or order in question on writ of certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

U.S. Consti., Amend. 5:

> No person shall . . . be deprived of . . . property, without due process of law. . . .

28 U.S.C. § 455(a):

> Any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 1654:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

Fed. R. App. P. 38:

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to

respond, award just damages and single or double costs to the appellee.

Code of Judicial Conduct, Canon 3(C)(1):

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which (a) the judge has personal bias or prejudice concerning a party, ...

STATEMENT OF THE CASE

The Tenth Circuit has a long history of imposing harsh and unjustified sanctions against the petitioner without due process of law. *See, e.g.,Casillan v. Regional Transportation District,* 986 F.2d 1426 (10th Cir. 1993) (monetary sanctions); *In re Smith*, 10 F.3d 723 (10th Cir. 1993) (indefinite suspension from the practice of law); *In re Smith*, 76 F.3d 335 (10th Cir. 1996) (disbarment); *Howard v. Mail-Well Envelope Co.*, 150 F.3d 1227 (10th Cir. 1998) (*en banc*) (imposition of prospective filing restrictions). Citing *Howard*, the Tenth Circuit has repeatedly refused to permit the petitioner to proceed *pro se* on appeal or to apply for reinstatement to the Tenth Circuit bar. In the present case, for example, the Tenth Circuit required the petitioner to be represented by counsel or have his appeal dismissed. Unable to afford counsel, the petitioner was required to seek representation from his wife, M. Julia Hook, a natural resources lawyer, who courageously agreed to provide representation despite the Tenth Circuit's palpable bias or prejudice against the petitioner.

On April 1, 2003, the petitioner filed suit in the United States District Court for the District of Colorado alleging a continuing conspiracy by several judges of the Tenth Circuit, all of whom were sued individually and in their official capacities, and others, to deprive him of his civil rights under 42 U.S.C. §§

1985(3), 1986 and 1983, and the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Others named as defendants were several judges of the United States Court of Appeals for the Fifth Circuit, the United States District Court for the District of Colorado, the United States District Court for the Northern District of Texas, and the Colorado Supreme Court, all of whom participated in the continuing conspiracy alleged in the complaint by suspending and/or disbarring the petitioner from the bars of their courts based on the Tenth Circuit's transparently invalid suspension and disbarment orders. It should be noted, however, that the petitioner is a member in good standing of the bars of the Supreme Court of Texas and the United States Court of Appeals for the Federal Circuit, both of which declined to suspend or disbar the petitioner.

On December 6, 2005, the Tenth Circuit issued its order and judgment denying the petitioner's motion and supplemental motion to recuse and/or disqualify itself from the appeal of the petitioner's tax cases from the United States Tax Court, whose jurisdiction was based on 26 U.S.C. § 7442. Instead of recusing or disqualifying itself under 28 U.S.C. § 455(a), the Tenth Circuit affirmed the Tax Court's judgment summarily denying the petitioner's motion to vacate or revise the

Tax Court's previous orders;[1] refused to rule on the issue of whether the Tax Court had deprived the petitioner of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States;[2] and ordered the petitioner and his wife/attorney to pay attorney fee sanctions of $6,000 to the Commissioner of Internal Revenue for filing an alleged "frivolous" appeal.

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[1]In its previous orders, the Tax Court dismissed the petitioner's tax cases as a sanction for his alleged failure to properly prosecute, and entered a default judgment against the petitioner, in favor of the Commissioner of Internal Revenue, for tax, penalties and interest of more than $500,000. The Tax Court dismissed the petitioner's tax cases and entered a default judgment against the petitioner despite the fact that the Tax Court's previous orders were the result of a fraud on the petitioner and the Tax Court perpetrated by the Commissioner of Internal Revenue.

[2]The Tax Court refused to hold a due process hearing before issuing its previous orders and denying the petitioner's motion to vacate or revise its previous orders, as the result of which the petitioner was deprived of the opportunity to present evidence on the false and defamatory allegations made by the Commissioner of Internal Revenue.

ARGUMENT

Based on the foregoing statement of the case, it was clearly improper for the judges of the Tenth Circuit to refuse to comply with 28 U.S.C. § 455(a) requiring a judge of the United States to disqualify himself in any proceeding in which his impartiality might reasonably be questioned. *See Cheney v. U.S. District Court for the District of Columbia,* 541 U.S. 913, 917 (2004) ("Let me [Justice Scalia] respond at the outset, to Sierra Club's suggestion that I should 'resolve any doubts in favor of recusal.' That might be sound advice if I were sitting on a Court of Appeals."); *Microsoft Corp. v. United States et al.*, 530 U.S. 1301, 1303 (2000), citing *Liteky v. United States*, 510 U.S. 540, 548 (1994), and *In re Drexel Burnham Lambert, Inc.*, 861 F 2d. 1307, 1309 (2nd Cir. 1988); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 861 (1988) (stating that § 455(a) requires judicial recusal if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge of his interest or bias in the case). *See also, United States v. Chantal*, 902 F. 2d 1018, 1023 (1st Cir.1990) (stating that the language of § 455(a) is automatic, mandatory and self-executing; that § 455(a) eliminated the "duty to sit doctrine"; and that § 455(a) attacks "the appearance of bias, not just bias in fact"). *See also,* Canon 3(C)(1) of the Code of Judicial Conduct providing that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's

impartiality might reasonably be questioned, including but not limited to instances in which (a) the judge has personal bias or prejudice concerning a party, ..." In the present case, the Tenth Circuit cited *Switzer v. Berry*, 198 F.3d 1255 (10th Cir. 2000) in support of its refusal to comply with § 455(a); however, the decision in *Switzer* is in conflict with relevant decisions of this Court, as well as decisions of other United States Courts of Appeals on the same important matter. It should also be recognized that while the panel of three judges participating in the Tenth Circuit's decision in the present case were not joined as defendants in the petitioner's lawsuit, all three participated in other Tenth Circuit decisions imposing harsh and unjustified sanctions against the petitioner without due process of law.

It was clearly improper for the judges of the Tenth Circuit to refuse to rule on the issue of whether the Tax Court had deprived the petitioner of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. This refusal to rule, which further demonstrates the Tenth Circuit's bias or prejudice against the petitioner, is in conflict with decisions of other United States Courts of Appeals on the same important matter. *See, e.g., Drobny v. Comm'r*, 113 F.3d 670 (7th Cir. 1997), in which the petitioners filed their motion to vacate eight years after the Tax Court judgment had been entered; but, because the petitioners raised the issue of

fraud on the court, the Seventh Circuit held that the Tax Court properly determined that it had jurisdiction, and granted the petitioners an evidentiary hearing that lasted three days and included 12 witnesses and more than 200 exhibits. *See also Dufresne v. Comm'r*, 26 F.3d 105 (9th Cir. 1994), in which the Tax Court initially refused to hold a due process hearing on the taxpayer's claim that IRS attorneys had perpetrated a fraud on the court; but the Ninth Circuit, after considering the issue on appeal, remanded with instructions to hold a due process hearing. Even after the mandated due process hearing and the entry of extensive findings of fact, however, the Tax Court still was unwilling to find that a fraud had been perpetrated on the court–deciding instead that the IRS attorneys' course of conduct constituted harmless error because there had been no showing of prejudice to the taxpayers. Holding that "prejudice is not an element of fraud on the court," on appeal, the Ninth Circuit determined that the Tax Court's refusal to grant the taxpayers' motion to vacate the judgment on the basis of fraud on the court constituted an abuse of discretion. *See also Dixon v. Comm'r*, 316 F.3d 1041 (9th Cir. 2003), citing *Abatti v. Comm'r*, 859 F.2d 115, 117 (9th Cir. 1988) and *England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960); *Davenport Recycling Assocs. v. Comm'r*, 220 F.3d 1255 (11th Cir. 2000); *Billingsley v. Comm'r*, 868 F.2d 1081, 1085 (9th Cir. 1989), which stands for the proposition that the Tax Court lacks jurisdiction over a decision once it becomes final

except that the Tax Court retains jurisdiction ". . .to entertain such motions [motions to vacate] at any time, where the decision was obtained by fraud on the court,"citing *Abatti v. Comm'r*, 859 F.2d 115, 117 (9th Cir. 1988); and *Toscano v. Comm'r.*, 441 F.2d 930, 933 (9th Cir. 1971), holding that a decision obtained by fraud on the Tax Court is "not a decision at all" and, therefore, could be set aside at any time.

In ordering the petitioner and his wife/attorney to pay attorney fee sanctions of $6,000 to the Commissioner of Internal Revenue for filing an alleged "frivolous" appeal, the Tenth Circuit said:

> An unvarnished recitation of the steps leading to Mr. Smith's appeal demonstrates its frivolousness. He and Ms. Hook were co-petitioners in the dismissed Tax Court cases. Only Ms. Hook timely appealed the dismissals. In Ms. Hook's appeal, this court summarily affirmed the Tax Court's actions. *Hook*, 103 Fed. Appx. at 664. Mr. Smith then asked the Tax Court for leave to vacate or revise its just-affirmed decisions. The Tax Court denied his motions. Mr. Smith, represented by Ms. Hook, appealed to this court.

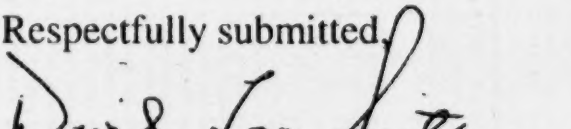
However, this ignores the fact that the petitioner was

precluded from filing his own appeal of the Tax Court's actions because of the Tenth Circuit's decision in *Howard v. Mail-Well Envelope Co.*, 150 F.3d 1227 (10th Cir. 1998) (*en banc*), imposing prospective filing restrictions against the petitioner without due process of law. In her appeal of the Tax Court's actions, the petitioner's wife/attorney did not raise the issue of whether the Tax Court's previous orders were the result of a fraud on the Tax Court perpetrated by the Commissioner of Internal Revenue, or whether the Tax Court had deprived the petitioner of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. The petitioner raised these issues for the first time in his motion to vacate or revise the Tax Court's previous orders. Under these circumstances, the petitioner's appeal was not repetitive of issues previously raised by his wife/attorney in her appeal of the Tax Court's actions, and was not otherwise "frivolous" under Fed. R. App. P. 38. Moreover, the definition of the term "frivolous" used by the Tenth Circuit was so vague and indefinite as to violate due process of law. *See Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987), in which the Tenth Circuit defined a "frivolous" appeal as one where ". . . the result is obvious, or the appellant's arguments of error are wholly without merit." *See id.* at 1510. Considering the Tenth Circuit's long history of imposing harsh and unjustified sanctions against the petitioner without due process of law, it is not surprising that the Tenth Circuit would resort to this

same tactic in the present case. However, it should be recognized that this tactic was employed for the improper motive or purpose of depriving the petitioner of his right to appeal and receive meaningful appellate review, including his right to proceed *pro se* or by counsel under 28 U.S.C. § 1654. Therefore, in addition to the fact that the Tenth Circuit's sanctions order further demonstrates the Tenth Circuit's bias or prejudice against the petitioner, the Tenth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court.

In conclusion, the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the Tax Court, as to call for an exercise of this Court's supervisory power. As the result of this departure, the petitioner has been deprived of his property without due process of law.

Respectfully submitted,



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PRO SE PETITIONER

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID LEE SMITH, **FILED: 12/6/05**

Petitioner-Appellant No. 04-9009

v. (T.C. No. 8747-00)

COMMISSIONER OF INTERNAL REVENUE, (Tax Court)

Respondent-Appellee.

DAVID LEE SMITH,

Petitioner-Appellant, No. 04-9010

v. (T.C. No. 11725-02)

COMMISSIONER OF INTERNAL REVENUE, (Tax Court)

Respondent-Appellee.

ORDER AND JUDGMENT*

Before **LUCERO, PORFILIO,** and **ANDERSON,** Circuit Judges.

After examining the briefs and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

In these appeals, David Lee Smith asserts that the United States Tax Court erred in denying his motions for leave to file motions to vacate or revise that court's earlier decisions. We affirm, and we deny Smith's motions for recusal of this court and his motion for attorney fees. We grant the government's motion for sanctions.

Motions to Recuse

First, we address Mr. Smith's motion and supplemental motion for recusal and disqualification of the entire United States Court of Appeals for the Tenth Circuit. Federal judges have a "'duty to sit' on cases filed with the court." *Switzer v. Berry*, 198 F.3d 1255, 1257 (10th Cir. 2000). Recusal of a judge is not "mandated upon the merest unsubstantiated suggestion of personal bias or prejudice." *Id.* at 1258 (quotations omitted). In *Switzer*, we applied these principles and held that "a lawsuit brought indiscriminately against all the active

and senior judges on the Tenth Circuit Court of Appeals does not operate automatically to render the court unable to hear and decide an appeal brought by the plaintiff/petitioner." *Id.*

Mr. Smith, an attorney, has a lengthy history with this court. Due to his pattern of abusive pro se litigation, the Tenth Circuit has enjoined his "proceeding as an appellant, or as a petitioner in an original proceeding, without the representation of a licensed attorney admitted to practice in this court, unless he first obtains permission to proceed pro se." *Howard v. Mail-Well Envelope Co.*, 150 F.3d 1227, 1232 (10th Cir. 1998). There is no restriction on Mr. Smith's proceeding as a represented litigant in this court.

Also, Mr. Smith has been disbarred from the practice of law in the Tenth Circuit for violating a prior suspension order and for practicing without authorization. *In re Smith*, 76 F.3d 335, 336 (10th Cir. 1996); *see also In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (suspending Mr. Smith from practicing law in the Tenth Circuit). According to Mr. Smith, the United States Court of Appeals for the Fifth Circuit, the United States District Court for the District of Colorado, the United States District Court for the Northern District of Texas, and the Colorado Supreme Court have also suspended or disbarred him, based on the Tenth Circuit's rulings. Supp'l Mot. at 2-3.

Mr. Smith has filed a complaint in district court

pursuant to 42 U.S.C. § 1983, naming as defendants eleven active and senior judges of the United States Courts of Appeals for the Tenth and Fifth Circuits, the Clerk of the Court for the Tenth Circuit Court of Appeals, several judges of the United States District Courts of Colorado and the Northern District of Texas, a Colorado attorney, and the Chief Judge of the Colorado Supreme Court. The district court dismissed the action and Mr. Smith filed an appeal. That appeal, *Smith v. Seymour*, No. 05-1032 (10th Cir., filed Jan. 1, 2005), is pending in this court. No member of this panel is named as defendant/appellee in Mr. Smith's current appeal.

Mr. Smith assumes, but does not show, prejudice or even a fact from which the appearance of prejudice might arise. Neither this court's enforcement of sanctions against him nor his action against other judges disqualifies this panel from hearing and resolving this appeal. Mr. Smith's motions are denied.

Tax Court's Dismissal of Motions to Vacate or Revise Decision

In the summer of 2000, Mr. Smith and his spouse Mary Julia Hook, who is also an attorney, filed a petition with the United States Tax Court seeking a redetermination of assessed deficiencies in their federal income tax liabilities for 1992, 1993, and 1994 (Case I). Two years later, Mr. Smith and Ms. Hook filed another petition seeking a redetermination of

deficiencies for 1995 and 1996 (Case II). This court has described the Tax Court litigation:

Case I was originally set for trial on September 10, 2001, but was continued, at Taxpayers' request, after a hearing. Following four days of trial between May 2, 2002, and August 19, 2002; several additional continuances at [T]axpayers' request and the consolidation of the first case with the more recently filed second case, Taxpayers failed to appear at the resumption of the trial scheduled for May 19, 2003. Taxpayers had filed an emergency motion to strike and reset the trial date on May 16, 2003. Taxpayers neglected to notify their ten witnesses under subpoena who did appear at the trial setting along with one witness on behalf of the Commissioner. Ms. Hook claims that she and her husband missed the trial setting because "they were both very, very sick." After permitting the taxpayers to show cause, the tax court then dismissed the consolidated cases for failure to properly prosecute, and entered a decision in the amounts requested by the Commissioner for each year.

Hook v. Comm'r, 103 Fed. Appx. 661, 662-63 (10th Cir. July 13, 2004) (unpublished) (citations omitted).

Ms. Hook, but not Mr. Smith, appealed the dismissal. In the course of resolving the appeal, this court observed that "[n]o court, including the tax court, is required to tolerate conduct that disrupts the orderly administration of justice and hinders the court's

management of its docket." *Id.* At 663. We concluded that the Tax Court did not abuse its discretion in dismissing the cases for failure to prosecute. *Id.* at 664.

After this court affirmed the judgment against Ms. Hook on appeal, Mr. Smith filed motions in the two Tax Court cases for leave to vacate or revise its decisions with regard to his interests. The Tax Court promptly denied th motions by imprint stamp, without comment. Mr. Smith, who is being represented by Ms. Hook in this court, then filed a notice of appeal from the denial of his motion in each of the cases. The appeals have been consolidated for procedural purposes only.

A Tax Court decision normally becomes final ninety days after entry if no party files a notice of appeal. *See* 26 U.S.C. §§ 7481(a)(a), 7483. And, "as a general rule, the Tax Court lacks jurisdiction to vacate a decision once it becomes final." *Davenport Recycling Assocs. V. Comm'r*, 220 F.3d 1255, 1259 (11th Cir. 2000) (collecting cases). Our sister circuits, however, have recognized an exception to the rule in instances of fraud on the court. *Id.*; *see also Drobny v. Comm'r*, 113 F.3d 670, 677 (7th Cir. 1997) (allowing a narrow exception to the rule of finality "if the party seeking to vacate the decision could convincingly establish that the decision resulted from a fraud on the court") (quotation omitted); *Billingsley v. Comm'r*, 868 F.2d 1081, 1085 (9th Cir. 1989) (acknowledging Tax Court

jurisdiction to entertain a motion to vacate at any time if the decision was obtained by fraud on the court).

In the Tax Court, Mr. Smith alleged that the dismissal orders were based on "false and defamatory" charges, which "constituted a fraud on petitioners and the Court." R., Vol. I, Doc. 32-A at 2 (Case II); *id.* at vol. VI, Doc. 90-A at 2 (Case I). Accordingly, we conclude that the Tax Court had jurisdiction to deny the motions to vacate.

We therefore proceed to the only substantive issues in this case: whether these rulings amounted to an abuse of discretion. *See Davenport Recycling Assocs.*, 220 F.3d at 1258 (collecting cases applying the abuse-of-discretion standard to the Tax Court's denial of leave to file a motion to vacate). The "high" standard for abuse of discretion requires a showing of "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Schrier v. Univ. of Colo.*, No. 03-1275, 2005 WL 2902586, at *3 (10th Cir. Oct. 31, 2005) (quotation omitted). Based on the record before us, we discern absolutely no abuse of discretion in the denial of Mr. Smith's motions to vacate.

Motions for Sanctions

The Commissioner has moved for an order requiring Mr. Smith and Ms. Hook to pay sanctions in the amount of $6,000 for bringing and maintaining a groundless appeal. Mr. Smith has opposed the motion

and countered with a request for sanctions against the government for $2,880 in attorney fees attributable to responding to the Commissioner's motion.

This court has the authority to impose sanctions: "[t]o deter frivolous and abusive litigation and promote justice and judicial efficiency, the federal courts are empowered to impose monetary sanctions, by statutes and the rules of civil and appellate procedure as well as their inherent right to manage their own proceedings." *Braley v. Campbell*, 832 F.2d 1504, 1510 (10th Cir. 1987); *see also* Fed. R. App. P. 38 ("If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."). In an appropriate case, Rule 38 permits sanctions against attorneys as well as parties, if an attorney has brought a truly frivolous appeal on behalf of a client. *Braley*, 832 F.2d at 1511. "An appeal is frivolous when the result is obvious, or the appellant's arguments of error are wholly without merit." *Id.* at 1515.

An unvarnished recitation of the steps leading to Mr. Smith's appeal demonstrates its frivolousness. He and Ms. Hook were co-petitioners in the dismissed Tax Court cases. Only Ms. Hook timely appealed the dismissals. In Ms. Hook's appeal, this court summarily affirmed the Tax Court's actions. *Hook*, 103 Fed. Appx. at 664. Mr. Smith then asked the Tax

Court for leave to vacate or revise its just-affirmed decisions. The Tax Court denied his motions. Mr. Smith, represented by Ms. Hook, appealed to this court.

For this blatant waste of judicial time and resources, sanctions are appropriate. Because the Commissioner filed a separate motion for sanctions (with documentation of the average expense in attorney salaries and costs incurred in defense of frivolous taxpayer appeals) and Mr. Smith responded in opposition to the motion, due process considerations have been met. We grant the Commissioner's motion and order Mr. Smith and Ms. Hook, jointly and severally, to pay the lump sum of $6,000 to the Commissioner. For obvious reasons, we deny Mr. Smith's counter-motion for attorney fees.

The judgment of the United States Tax Court is AFFIRMED. Mr. Smith's motions for recusal of this court are DENIED. The Commissioner's motion for sanctions is GRANTED; Mr. Smith's motion for sanctions is DENIED.
Entered for the Court

John C. Porfilio

Circuit Judge

FOOTNOTES

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID LEE SMITH,

Petitioner-Appellant,

v. Nos. 04-9009 & 04-9010

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

ORDER

Filed March 2, 2006

Before **LUCERO, PORFILIO,** and **ANDERSON,** Circuit Judges

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Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the

court be polled, the suggestion is also denied.

Entered for the Court
ELISABETH A. SHUMAKER,
Clerk

by:
Deputy Clerk